

STATE OF MONTANA COMPLIANCE SUPPLEMENT FOR AUDITS OF LOCAL GOVERNMENT ENTITIES	REF: CNTY-6
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PROGRAM/SUBJECT: Counties - Procurement, Bid Letting and Contracts	

TYPES OF ENTITIES: Counties

SOURCE OF AUTHORIZATION AND REGULATIONS: As noted below, various sections of Titles 2, 7, 15, and 18 of the Montana Code Annotated; Attorney General's Opinions (A.G.O.); *The Common Rule*, and U.S. Internal Revenue Service Codes.

INFORMATION CONTACT: Montana Department of Administration
Local Government Services Bureau
Name: No specific individual named
Phone Number: (406) 841-2907

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

BIDDING – ADVERTISEMENT REQUIRED:

1. Compliance Requirements:

- A contract for the purchase of any vehicle, road machinery or other machinery, apparatus, appliances, equipment, or materials or supplies or for construction, repair, or maintenance in excess of \$50,000 may not be entered into by a county governing body without first publishing a notice calling for bids (advertised bids). (Section 7-5-2301, MCA)

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

BIDDING – ADVERTISEMENT REQUIRED - continued:

1. Compliance Requirements - continued:

(Note: A lease contract with a purchase option is subject to the bidding requirements of Section 7-5-2301, MCA, if the total amount of the lease payments, together with the purchase option price, exceeds the threshold in that Section. (A.G.O. Number 101, Volume 38))

(See Compliance Requirement No. 3 below for audit requirements for lease/purchase agreements.)

- The following are the exceptions to the bidding requirements:
 1. the governing body may purchase at public auction any vehicle, road machinery or other machinery, apparatus, appliances, equipment, or materials or supplies for an amount less than \$60,000. (Section 7-5-2303, MCA)
 2. public printing contracts entered into in accordance with the provisions of Title 7, Chapter 5, Part 24, MCA. (Section 7-5-2304, MCA)
 3. purchases necessitated by emergencies, as specified in Section 7-5-2304(2), MCA. (Section 7-5-2304, MCA)
 4. repair of bridges and roads damaged by disasters and calamities, provided there is an express determination that the repairs are urgently and immediately needed. (A.G.O. Number 162, Volume 37)
 5. a county lease contract with no purchase option (A.G.O. Number 101, Volume 38)

(See Compliance Requirement No. 3 below for audit requirements for lease/purchase agreements.)

Suggested Audit Procedure:

- As part of expenditure testing, review minutes of the board of county commissioners meetings and bid files to determine that applicable competitive bidding requirements were followed for those transactions which exceed the above dollar amounts.

BIDDING – GAS TAX FUNDS:

2. Compliance Requirement:

- If a county contracts for construction, reconstruction, maintenance, or repair of roads costing in excess of \$25,000 to be paid with gasoline tax funds, the funds must be disbursed to the lowest responsible bidder according to applicable bidding procedures. (Section 15-70-101(5), MCA)

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

BIDDING – GAS TAX FUNDS - continued:

Suggested Audit Procedure:

- Select expenditures of gasoline tax funds which are in excess of \$25,000. If the expenditures are for construction, reconstruction, maintenance, or repair of roads, review minutes of the board of county commissioners meetings and bidding files to verify that the contracts were awarded to the lowest responsible bidder according to applicable bidding procedures.

BIDDING – LEASE/PURCHASE AGREEMENTS:

3. Compliance Requirements:

- Lease/purchase agreements should be treated as contracts for sale and are subject to the statutory bidding requirements. (Section 7-5-2307, MCA)
- Every contract entered into for the rental of machinery, equipment, apparatus, appliances, materials, or supplies of any kind which shall provide for payment of rental by the county and that, after a certain fixed amount has been paid as rental, the property shall become the property of the county or any other similar provisions or conditions shall be deemed and construed to be a contract for sale of such property, and all of the provisions Title 7, Chapter 5, Part 23, MCA shall apply thereto and govern and control the same. (Section 7-5-2307, MCA)
- The total amount of the lease payments, together with the purchase option price, should be considered when determining whether the agreement is subject to the bidding provisions of Section 7-5-2301, MCA. (A.G.O. Number 101, Volume 38).

Suggested Audit Procedures:

- Review any lease/purchase contracts and determine the total amount of the lease payments and the purchase option price. If the sum of these amounts exceeds the limits for which competitive bidding is required (see above), verify that the lease/purchase agreement was subject to the applicable competitive bidding requirements.
- Review any rental contract and determine if property shall become the property of the county after a certain fixed amount has been paid as rental (those or any other similar provisions or conditions shall be deemed and construed to be a contract for sale of such property). If the rental contract appears to be a rental-purchase contract determine if the sums of the rental payments exceed the limits for which competitive bidding is required (see above). If the payments exceed the limits for which competitive bidding is required, verify that the rental-purchase contract was subject to the applicable competitive bidding requirements.

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

DIVIDING CONTRACTS – PROHIBITED:

4. Compliance Requirement:

- Public work or construction projects for which competitive bidding is required may not be divided into several contracts to circumvent the competitive bidding requirements. (Section 7-5-2305, MCA)

(Note: In reviewing case notes the Department identified a court case where the court found sufficient substantial evidence to sustain guilty verdicts and judgment against three County Commissioners for official misconduct committed by failing to perform a mandatory duty of advertising a county road contract for bid and by knowingly performing the forbidden act of dividing a single road contract into parts to circumvent bidding requirements. (St. v. DeGeorge, 173 M 35, 566 P2d 59 (1977)))

Suggested Audit Procedure:

- Determine, through expenditure testing and a review of the minutes of commission meetings, that no contract was divided into several parts to circumvent the competitive bidding requirements.

BID SECURITY DEPOSIT:

5. Compliance Requirement:

- Bids for public contracts must be accompanied by a bid security deposit in the form of cash; cashier's check, certified check, bank money order, or bank draft drawn and issued by a federally chartered or state-chartered bank insured by the federal deposit insurance corporation; or a bid bond, guaranty bond, or surety bond executed by a surety corporation authorized to do business in Montana. (Sections 18-1-201 through 18-1-203, MCA)

(Note: The public authority soliciting or advertising for bids may not require that a bid bond, guaranty bond, or surety bond provided for in 18-1-203(1)(a)(iii) be furnished by a particular surety company or by a particular insurance producer for a surety company.)

Suggested Audit Procedure:

- Review the minutes of governing body meetings, and the requests for bids and bidding files of selected projects and verify that a bid security deposit, in some form, accompanied all bids.

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

AWARDING PUBLIC CONTRACTS:

6. Compliance Requirements:

- Subject to Section 7-5-2309, MCA, as noted below, every contract subject to bidding must be let to the lowest responsible bidder (**effective October 1, 2005** - except for an “Alternative Project Delivery Contract” which pertains to a construction management contract, a general contractor construction management contract, or a design-build contract, as provided in Title 18, Chapter 2, Part 5, MCA). (Section 7-5-2301, MCA)

(Note: In the case notes pertaining to *Modern Mach. v. Flathead County*, 202 M 140, 656 P2d 206, 39 St. Rep. 2383 (1982), it was noted that the Supreme Court held that the acceptance motion approved by the Commission and recorded in the Commission minutes constituted an acceptance of the bid.)

- Public contracts for construction, repair or public works must be awarded to the lowest responsible bidder without regard to residency (except for “Alternative Project Delivery Contracts” as provided in Title 18, Chapter 2, Part 5, MCA, effective October 1, 2005).. However, a resident bidder must be allowed a preference on a contract against the bid of any nonresident bidder from any state or country that enforces a preference for resident bidders. The preference given to resident bidders of this state must be equal to the preference given in the other state or country. (Section 18-1-102, MCA)
- A public contract for the purchase of goods must be let to the lowest responsible bidder without regard to residency. However, a resident must be allowed a preference on a contract against the bid of a nonresident if the state or country of the nonresident enforces a preference for residents. The preference must be equal to the preference given in the other state or country. (Section 18-1-102, MCA)

(Note: *The Common Rule* (Section _36(c)(2)) prohibits the use of statutorily or administratively imposed in-state or local geographical preferences in the evaluation of bids or proposals for federally-funded contracts, except in those cases where applicable federal statutes expressly mandate or encourage geographic preference.)

[Government-wide guidance for administering grants and cooperative agreements with States and local governments is contained in the OMB Circular A-102 Common Rule (a.k.a. Grants Management Common Rule), which was codified by each Federal funding agency in its title of the *Code of Federal Regulations*. The Common Rule section numbers are referred to without the Federal agency’s part number (e.g., §_36 would refer to the same section in all agency regulations). This allows auditors to refer to the same section numbers when discussing administrative

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

AWARDING PUBLIC CONTRACTS - continued:

6. Compliance Requirements - continued:

issues with different Federal funding agencies. The Codification of Government-wide Grants Requirements by Department can be accessed via this web site:

<http://www.whitehouse.gov/omb/grants/chart.html>]

- If there are no out-of-state bidders for a contract subject to competitive bid under Title 7, Chapter 5, Part 23, MCA, the contract may be awarded to the lowest and best responsible bidder that is a county resident and that makes a bid that is no more than \$500 or 3% higher, whichever is less, than the bid of the lowest responsible bidder that is not a county resident. If there is one or more out-of-state bidders for a contract for construction, repair, or maintenance of a building, road, or bridge that is in excess of \$50,000 and that is subject to competitive bid under Title 7, Chapter 5, Part 23, MCA, the state resident bid preference provided in Section 18-1-102, MCA, applies as noted above. (Section 7-5-2309, MCA) **(See discussion of prohibitions of the Common Rule related to geographical bid preferences, above.)**
- The request for bids must require that if the bidder is awarded the contract, the bidder will enter into a formal contract and give a good and sufficient bond to secure the performance of the terms and conditions of the contract. (Sections 18-1-202(1)(a) and 18-2-201, MCA)

(Note: This faithful performance bond requirement may be waived for building or construction projects that cost less than \$50,000. (Section 18-2-201(4), MCA))

Suggested Audit Procedures:

- Review the minutes of governing body meetings, and the requests for bids and bidding files of selected projects.
- Subject to Section 7-5-2309, MCA, determine that every contract subject to bidding is let to the lowest bidder as discussed above.
- Determine if residency preference was allowed in the awarding of the contract on any project or for the purchase of goods. If allowed, verify that the preference met the provisions of Section 18-1-102, MCA. If the selected projects were federally-funded, verify that any residency preference was permitted by relevant federal statutes.
- Verify that the individuals or firms to whom contracts were awarded were required to provide performance bonds, unless the bond requirement was waived as provided by statute.

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

FEDERAL INFORMATION RETURNS:

7. Compliance Requirement:

- The entity must report on a Federal Information Return, Form 1099-MISC, all payments of \$600 or more which the entity makes during a calendar year to anyone, other than a corporation or tax-exempt organization, who is not an employee. (U.S. Internal Revenue Service Codes)

(Note: The following are some examples of payments to be reported on Form 1099-MISC. For a complete list, contact the IRS:

Professional service fees, such as fees to attorneys (including corporations), accountants, architects, contractors, subcontractors, etc.

Payments by attorneys to witnesses or experts in legal adjudication.)

Suggested Audit Procedure:

- As part of expenditure testing, determine that the entity filed a Form 1099-MISC for each payee who was not a corporation or tax-exempt organization to which the entity had paid \$600 or more for contracted services during the calendar year.

INSTALLMENT CONTRACTS – LENGTH OF TERM:

8. Compliance Requirement:

- The county may enter into installment contracts for the purchase of any vehicle or road machinery of any kind, for any other machinery, apparatus, appliance, or equipment, or for any materials or supplies of any kind which cost in excess of \$4,000. The period of the installment contract may not be for more than 10 years. (Section 7-5-2306, MCA)

Suggested Audit Procedure:

- Review contract documents for installment purchases to determine that the purchase cost was at least \$4,000 and that the installment period does not exceed 10 years.

PRINTING CONTRACTS:

9. Compliance Requirements:

- The county commissioners shall contract for all advertising required by law and for all printed forms required by the county. (Section 7-5-2411, MCA)

(Note: Section 7-5-2414, MCA, states that the provisions of Title 7, Chapter 5, Part 24, MCA, do not apply to any printing or advertising that may be required in connection with the holding of county fairs and expositions.)

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

PRINTING CONTRACTS - continued:

9. Compliance Requirements - continued:

- Printing contracts for advertising required by law must be awarded to a newspaper that is published in the county, has general bona fide and paid circulation with the second class mailing privilege, and has been published continuously at least once a week in the county for the 12 months preceding the awarding of the contract. (Section 7-5-2411(1), MCA)
- Contracts for printed forms and materials may be awarded on an annual basis or may be awarded for a specific printing job. (Section 7-5-2411(2), MCA)
- The county clerk and recorder shall maintain a list of willing bidders for county printing and shall notify those on the list of any call for bids. (Section 7-5-2411(3), MCA)
- The contract must be let to the printing establishment that in the judgment of the county commissioners is the most suitable for performing the work. (Section 7-5-2412(1), MCA)

(Note: The term of a contract for county printing or county legal advertising may not exceed a period of 2 years. (Section 7-5-2412(3)))

- The board of county commissioners shall call for competitive bids from persons or firms qualified to bid on county printing, or for county legal advertising if there is more than one legally qualified newspaper in the county. (Section 7-5-2413, MCA)

Suggested Audit Procedure:

- Review the minutes of commission meetings and the bidding files for contracts for county legal advertising and for printed forms and materials. Verify that contracts were awarded for legal advertising and printed forms and materials in the manner prescribed by Title 7, Chapter 5, Part 24, MCA.

CONFLICT OF INTEREST:

10. Compliance Requirements:

- County officers; or any deputies or employees of a county, may not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees if they are directly involved with the contract. (Section 2-2-201, MCA)

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

CONFLICT OF INTEREST - continued:

10. Compliance Requirements - continued:

- Members of the board of county commissioners should not be interested, directly or indirectly, in any property purchased for the county, in any purchase or sale of property belonging to the county, or in any contract made by the board.
(Section 7-5-2106, MCA)

- The following are exceptions to the conflict of interest requirements:
 1. contracts awarded on competitive bidding procedures,
 2. contracts awarded because of certain geographic restrictions,
 3. merchandise sold to the highest bidder at public auctions, and
 4. investments or deposits in financial institutions that are in the business of loaning or receiving money.
(Section 2-2-201, MCA, and A.G.O. No. 28, Vol. 40).

(Note: A public officer or public employee shall, prior to acting in a manner that may impinge on public duty, including the award of a permit, contract, or license, disclose the nature of the private interest that creates the conflict. The public officer or public employee shall make the disclosure in writing to the *secretary of state*, (effective October 1, 2005:to the commissioner of political practices), listing the amount of private interest, if any, the purpose and duration of the person's services rendered, if any, and the compensation received for the services or other information that is necessary to describe the interest. If the public officer or public employee then performs the official act involved, the officer or employee shall state for the record the fact and summary nature of the interest disclosed at the time of performing the act. (Section 2-2-131, MCA)

Suggested Audit Procedure:

- Determine, through a review of the minutes of the board of county commission meetings and through expenditure testing, that no member of the board has any apparent improper interest in any purchase, sale or contract as set forth in Sections 2-2-201 and 7-5-2106, MCA.

CONTRACT LIMITS:

11. Compliance Requirements:

- The county must obtain voter approval before incurring indebtedness or liability for any single purpose in an amount exceeding \$500,000. (Section 7-7-2101(2), MCA)

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

CONTRACT LIMITS - continued:

11. Compliance Requirements - continued:

- A county may borrow the following amounts without a vote of the electorate:
 - a. up to \$500,000 if the county's taxable value is less than \$50 million;
 - b. up to \$750,000 if the county's taxable value is between \$50 million and \$100 million; and
 - c. up to \$1 million if the county's taxable value is greater than \$100 million.
 (Sections 7-7-2402, MCA)

(Note: A.G.O. No. 56, Vol. 38, in interpreting Section 7-7-2101, MCA, stated that a contract whose total liability exceeds \$40,000 must be approved by the voters, even though it provides for annual payments of less than \$40,000, there is an option to purchase at the end of the contract term for an additional payment of less than \$40,000, and there is an option to cancel at any time. This opinion was addressing a question regarding a lease with certain purchase options (lease purchase contract). Also, it was written when the basic statutory limit specified in Section 7-7-2101, MCA, was \$40,000. 1981 and 1985 legislative amendments increased the basic limit from \$40,000 to \$150,000, and from \$150,000 to \$500,000, respectively.

A.G.O. No. 13, Vol 42, held that Section 7-7-2101, MCA, authorizes a county to incur a liability or indebtedness in an amount up to \$500,000 without an election, and that Section 7-7-2402, MCA, authorizes a county to borrow money in an amount up to \$10,000 without an election. (Note: Increased from \$10,000 to \$500,000 in 1991. Additional increases for certain class counties provided for in 1997 as noted in above compliance requirement.) That opinion also held that an installment purchase contract is not a "borrowing of money" within the meaning of Section 7-7-2402, MCA.

The 1997 Legislature amended Section 7-7-2402, MCA, to increase the limits for borrowing without a vote for counties with certain taxable values from \$500,000 to either \$750,000 or \$1,000,000, as noted above. Section 7-7-2101, MCA, was not amended and still states that a county may not incur indebtedness or liability for any single purpose in an amount exceeding \$500,000 without the approval of a majority of the electors voting at an election. Based on the above opinions, a lease purchase or installment contract or other incurring of indebtedness or liability differs from actually "borrowing money." We do not yet have any formal legal opinions or interpretations as to whether the increased borrowing limits above \$500,000 for certain class counties would also apply to lease purchase and installment contracts and other methods of "incurring liabilities" that do not actually constitute borrowing money. If you discover any situations in which a county incurs an indebtedness or liability in excess of \$500,000

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

CONTRACT LIMITS - continued:

11. Compliance Requirements - continued:

without voter approval that is not a “borrowing of money”, we recommend that you consult with the county attorney or other legal counsel.)

- A contract whose total liability exceeds \$500,000 must be approved by the voters, even though it provides for annual payments of less than \$500,000, there is an option to purchase at the end of the contract term for an additional payment of less than \$500,000, and there is an option to cancel at any time. (A.G.O. No. 56, Vol. 38).

Suggested Audit Procedure:

- Determine whether the county has incurred an indebtedness or liability or borrowed money during the audit period in an amount which exceeds the statutory limits noted above. If so, verify through a review of the minutes of commission meetings or other documentation that the indebtedness, liability, or borrowing was approved by the voters. Emphasis should be given to a review of lease/purchase and installment contracts.

RETAINAGE FEE FOR PUBLIC CONTRACTS:

12. Compliance Requirement:

- The maximum retainage applied to construction contracts may not exceed 5% if the contractor is performing by the terms of the contract. **(Note: Retainage means the ratio, in percent, of funds retained to the total amount to be paid to the contractor by the government entity)** (Section 18-2-316, MCA)

Suggested Audit Procedure:

- Review construction contracts entered into for the audit period under audit and determine through a review of the contracts, the minutes of the governing body, and an examination of expenditures, that the county did not withhold more than 5% of the contract amount or claim amount that the construction contractor submitted to the governing body for payment.

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

ACCEPTANCE AND FINAL PAYMENT ON CONSTRUCTION CONTRACTS:

13. Compliance Requirement:

- A government entity that enters into a contract for the construction of a building shall, unless otherwise provided by law or the contract and within 10 days after a request by the construction contractor for final acceptance, decide whether or not to make final acceptance. Within 30 days after final acceptance by the government entity, the government entity shall make the final payment of the contract price specified in the contract to the other party to the contract.

(Note: “Final Acceptance” means the government entity's acceptance of the construction of a building by the contractor upon certification by the architect, project engineer, or other representative of the government entity of final completion of the building.)

(Section 18-2-306, MCA)

Suggested Audit Procedures:

- Review the construction files to determine that the county and the construction contractor complied with the above compliance requirements. The file should contain a copy of the request from the construction contractor for the county to make final acceptance of the construction of a building. Unless otherwise provided by law or the contract and within 10 days after a request for final acceptance, the file should document the formal decision from the architect, project engineer, or other representative of the governmental entity as to whether or not the government will make final acceptance.
- Review the construction files and expenditures to determine whether the contract price was paid in full within 30 days after final acceptance by the government entity.

ARCHITECTURAL, ENGINEERING, AND LAND SURVEYING SERVICES:

14. Compliance Requirements:

- The legislature established a state policy that governmental agencies, including counties, must publicly announce requirements for architectural, engineering, and land surveying services and negotiate contracts for such professional services on the basis of demonstrated competence and qualifications for the type of professional services required and at fair and reasonable prices. (Section 18-8-201, MCA)
- Each government shall publish in advance its requirement for professional services. The announcement must state concisely the general scope and nature of the project or work for which the services are required and the address of a representative of the government who can provide further details. A government may comply with this section by:

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

ARCHITECTURAL, ENGINEERING, AND LAND SURVEYING SERVICES – cont’d:

14. Compliance Requirements - continued:

- (1) publishing an announcement on each occasion when professional services provided by a licensed professional are required by the government; or
 - (2) announcing generally to the public its projected requirement for any category or type of professional services.

(Section 18-8-203, MCA)
- In the procurement of the above professional services, the government may encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The government shall evaluate current statements of qualifications and performance data on file with the government, together with those that may be submitted by other firms regarding the proposed project, and conduct discussions with one or more firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services. The government shall then select, based on criteria established under government procedures and guidelines and the law, the firm considered most qualified to provide the services required for the proposed project. The government procedures and guidelines must be available to the public and include at a minimum the criteria specified in 18-8-204(2)(b) as they relate to each firm.

(Section 18-8-204, MCA)
- The government shall negotiate a contract with the most qualified firm for the above professional services at a price which the government determines to be fair and reasonable. In making its determination, the government shall take into account the estimated value of the services to be rendered, as well as the scope, complexity, and professional nature thereof. If the government is unable to negotiate a satisfactory contract with the firm selected at a price the government determines to be fair and reasonable, negotiations with that firm must be formally terminated and the government shall select other firms in accordance with 18-8-204 and continue as directed in this section until an agreement is reached or the process is terminated.

(Section 18-8-205, MCA)
- This part need not be complied with by a government when the contracting authority makes a finding in accordance with this or any other applicable law that an emergency requires the immediate execution of the work involved. This part does not relieve the contracting authority from complying with applicable law limiting emergency expenditures.

(Section 18-8-211, MCA)

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

ARCHITECTURAL, ENGINEERING, AND LAND SURVEYING SERVICES – cont’d:

14. Compliance Requirements - continued:

- Counties securing architectural, engineering, and land surveying services for projects for which the fees are estimated not to exceed \$20,000 may contract for those professional services by direct negotiation. (Section 18-8-212, MCA)
- No agency may separate service contracts or split or break projects for the purpose of circumventing the provisions of Title 18, Chapter 8, Part 2, MCA. (Section 18-8-212, MCA)

Suggested Audit Procedure:

- Review the construction and bid files to determine if the county entered into any contracts for architectural, engineering, and land surveying services. If so, determine whether the contract was let in accordance with the statutory requirements outlined above.

ALTERNATIVE PROJECT DELIVERY CONTRACTS

15. Compliance Requirements:

- Alternative project delivery contract means a construction management contract, a general contractor construction management contract, or a design-build contract. (Section 18-2-501, MCA)
- A governing body that uses an alternative project delivery contract shall demonstrate that the governing body has or will have knowledgeable staff or consultants who have the capacity to manage an alternative project delivery contract.
- Prior to awarding an alternative project delivery contract, the governing body shall make a determination, in writing, that the proposal meets at least two of the sets of criteria described in (a) through (c) below, and that the proposal meets the provisions of (d). (Section 18-2-502, MCA)
 - (a) The project has significant schedule ramifications and using the alternative project delivery contract is necessary to meet critical deadlines by shortening the duration of construction.
 - (b) By using an alternative project delivery contract, the design process will contribute to significant cost savings.
 - (c) The project presents significant technical complexities that necessitate the use of an alternative delivery project contract
 - (d) Using an alternative project delivery contract will not encourage favoritism or bias in awarding the contract or substantially diminish competition for the contract.

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

ALTERNATIVE PROJECT DELIVERY CONTRACTS - continued

15. Compliance Requirements - continued:

- The governing body's decision to award an alternative project delivery contract must be based, at a minimum, on: (a) the applicant's history and experience with projects similar to the project under consideration; financial health; staff or workforce that is proposed to be committed to the project; approach to the project; and project costs, and (b) any additional criteria or factors that reflect the project's characteristics, complexities, or goals. (Section 18-2-503, MCA)
- At the conclusion of the selection process, the governing body shall state and document in writing the reasons for selecting the contractor that was awarded the contract. The documentation must be provided to all applicants and to anyone else, upon request. The governing body may compensate unsuccessful applicants for costs incurred in developing and submitting a proposal, provided that all unsuccessful applicants are treated equitably.

Suggested Audit Procedure:

- Review the construction and bid files to determine if the city or town entered into any alternative project delivery contracts. If so, determine whether the contract was let in accordance with the statutory requirements outlined above.

LOCAL GOVERNMENT ENERGY PERFORMANCE CONTRACTS:

16. Compliance Requirements – Effective April 7, 2005:

- Energy performance contracts are a means by which local government units can achieve energy and water conservation without an initial capital outlay. “Energy performance contract” is defined as a contract between a local government unit and a qualified provider for evaluation, recommendation, and implementation of one or more conservation measures, evaluation of conservation-related cost savings, and a guarantee of cost savings. (Sections 90-4-1101 & 1102, MCA)
- A local government may solicit requests for qualifications (RFQ) to enter into an energy performance contract and requests for proposals for investment grade energy audits, and negotiate a contract with the most qualified provider by following the process in Section 90-4-1104. Alternatively, the local government can avoid the RFQ process by selecting a qualified provider from a pre-qualified list provided by the Montana Department of Environmental Quality’s Air, Energy and Pollution Prevention Bureau. (Sections 90-4-1104 & 1105, MCA; MACo Newsletter 2/06)

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I. COMPLIANCE REQUIREMENTS AND SUGGESTED AUDIT PROCEDURES:

LOCAL GOVERNMENT ENERGY PERFORMANCE CONTRACTS - continued:

16. Compliance Requirements – Effective April 7, 2005 - continued:

- An investment grade audit serves as a basis for the terms of an energy performance contract. If the local government determines that the energy audit doesn't provide sufficient conservation-related cost savings, it shall pay the cost of the audit and decline to enter into the energy performance contract. If it is determined that the energy audit provides sufficient cost savings, the qualified provider shall provide plans for the proposed conservation measures. The local government may then negotiate the conservation measures to be included in the energy performance contract and enter into the contract. (Section 90-4-1106, MCA)
- The energy performance contract may include the option of payment of the costs of the energy audit and plans provided for proposed conservation measures through project financing. (Section 90-4-1106, MCA)
- The term of an energy performance contract must be a minimum of 3 years and may be up to the useful life of the conservation measures or 20 years, whichever is less. The contract must require the qualified provider to (1) guarantee the cost savings to the extent necessary to pay for the conservation measures, including financing charges incurred over the life of the contract, (2) monitor the costs savings, and (3) prepare an annual report documenting the performance of the conservation measures. (Section 90-4-1107, MCA)
- Payment obligations pursuant to an energy performance contract aren't general obligations of the local government and are collectible only from conservation-related costs savings provided in the energy performance contract and other revenue, if any, pledged in the energy performance contract. (Section 90-4-1109, MCA)

Suggested Audit Procedures:

- Review the construction and bid files and minutes of Board meetings to determine if the county entered into any energy performance contracts. If so, determine whether the required processes for the solicitation, selection and negotiations with the qualified provider, as required by State law, were followed.
- Review the energy performance contract and verify that the terms of the contract are in compliance with State law.
- Determine if the county has obtained project financing for the energy performance contract. If so, verify that the debt is serviced only from conservation-related savings and any other revenue pledged in the energy performance contract.